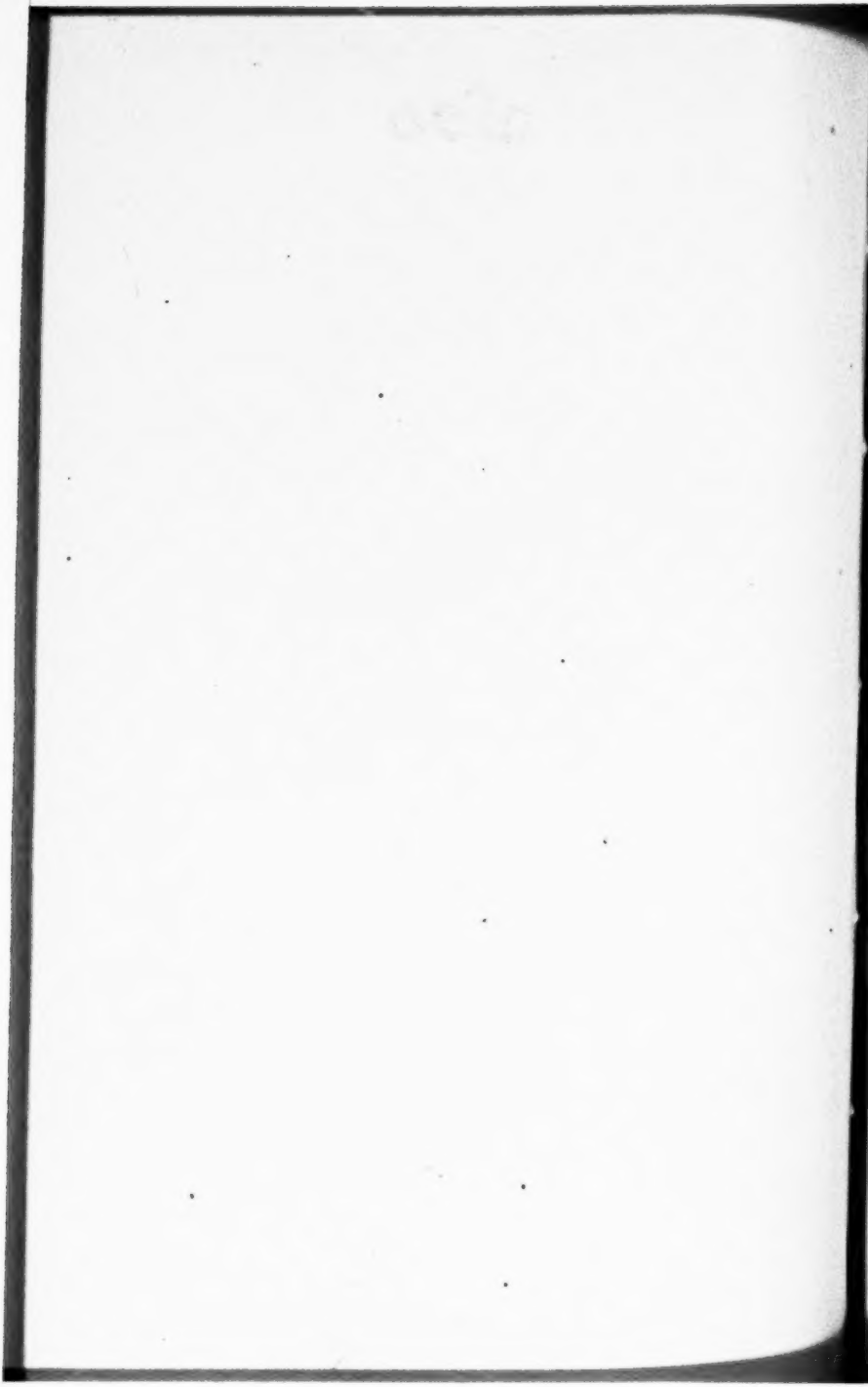


No. 206.

Brf. of Cheyney & 500 Leave for

Office Supreme Court
FILED
DEC 10 1900
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

Filed Dec. 10, 1900.

THE SCOTTISH UNION and NATIONAL INSURANCE COMPANY,
Respondent–Appellant,

v.

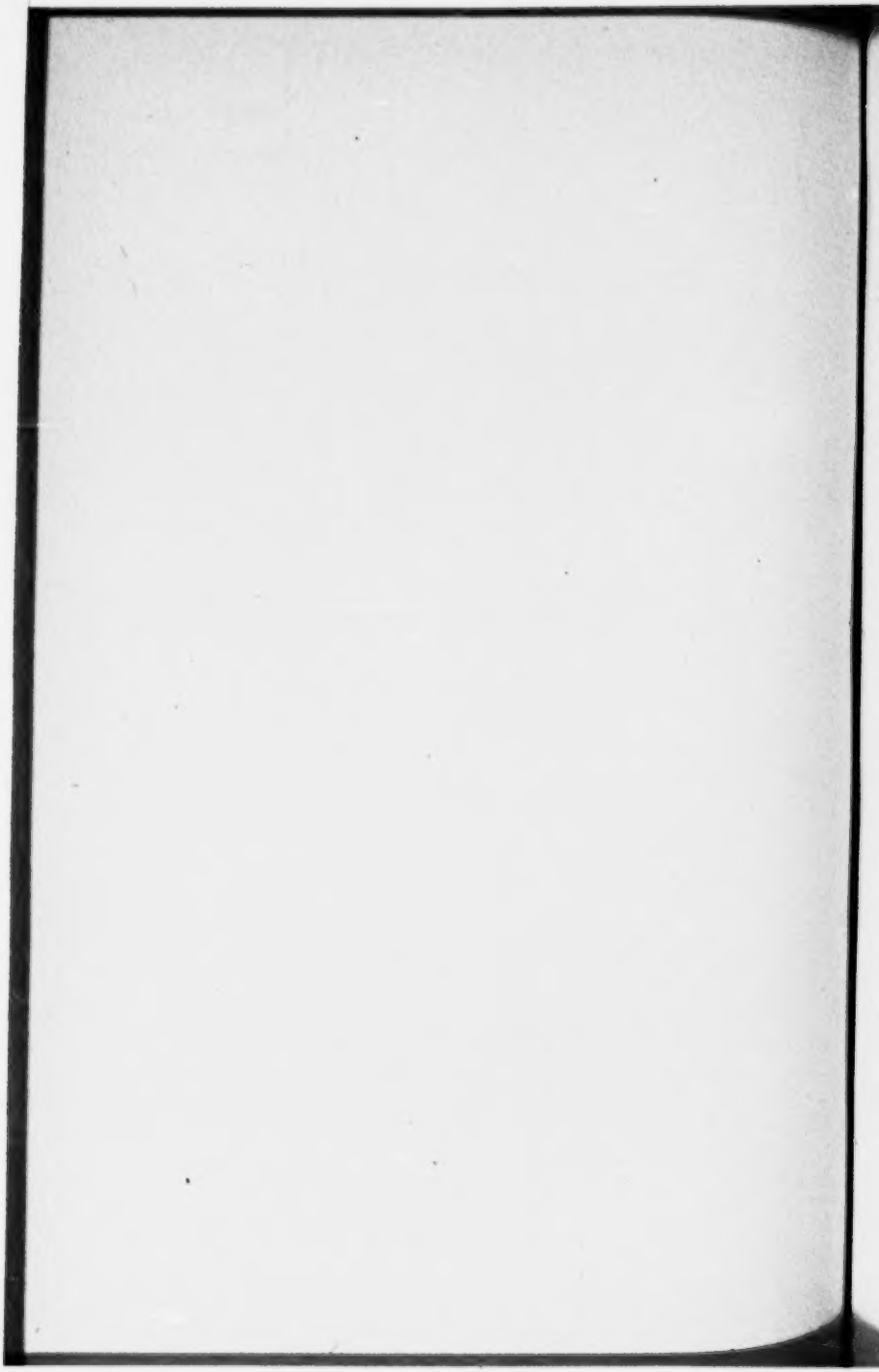
PETER HAGAN et al.,
Libellants–Appellees.

Petition of Peter Hagan et al., for a Writ of Certiorari to Issue to the Circuit Court of Appeals for the Third Circuit, in the above Entitled Action.

Brief on Behalf of Petitioners.

HORACE L. CHEYNEY,
JOHN FREDERICK LEWIS,
Of Counsel.

BOURSE BUILDING,
PHILADELPHIA.



24049

IN THE

Supreme Court of the United States.

HAGAN, *et al.*,

Libellants-Appellees,

v.

THE SCOTTISH UNION & NATIONAL INSURANCE COMPANY,

Respondents-Appellants.

IN THE MATTER OF THE PETITION OF HAGAN ET AL., FOR A WRIT OF CERTIORARI DIRECTED TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS.

The facts are fully stated in the petition.

It is submitted that a writ of "certiorari" ought to issue for the following reasons:

1. Because the Circuit Court of Appeals did not follow the construction of the clause "for account of whom

it may concern" by this Court in Hooper v. Robinson, 98 U. S. 528, but placed a different construction thereon.

2. Because the clause "for account of whom it may concern" is in general use, and the construction thereof by the Circuit Court of Appeals is contrary to its universally accepted meaning in the insurance business.

3. Because the decision of the Circuit Court of Appeals, as to the relative effect to be given to the written and printed clauses of a policy of insurance, is opposed to the established law upon the subject.

4. Because the decision of the Circuit Court of Appeals, that the conveyance of the half interest caused a forfeiture of the entire policy, is opposed to the general rule that there is no forfeiture so long as the person originally insured retains an insurable interest.

I.

The Circuit Court of Appeals did not follow the construction of the clause "for account of whom it may concern," by this Court, in Hooper v. Robinson, 98 U. S. 528.

The primary question is whether the general printed conditions of the policy, providing for a forfeiture in case of change of interest, etc., upon which the respondent relied, have any application whatever to the present contract of insurance. The answer to this question depends entirely upon the proper construction of the written clause of the

policy "does insure Peter Hagan & Company *for account of whom it may concern.*"

The learned Judge of the District Court followed the construction of that clause by this Court in *Hooper* v. *Robinson, supra*, and held, that as so construed, the printed forfeiture clause and the written clause were inconsistent, and that the latter, by the ordinary rules of construction, must prevail over the former.

The Circuit Court of Appeals reversed this decision and held that the two clauses were not "irreconcilably repugnant," but that Court could and did only reach that conclusion by placing a construction upon the written clause directly opposed to that of this Court in *Hooper* v. *Robinson, supra.*

The view of the Court of Appeals as to the meaning of this clause is thus expressed in the opinion of DALLAS, J. (Record, p. 40):

> "That the policy was issued for account of whom it may concern is undeniable, but whom could it concern? *Possibly the then existing or future creditors of the boat, or perhaps the constituents of Peter Hagan & Company.*"

A comparison of that construction with the decision in *Hooper* v. *Robinson, supra*, will show clearly the error of the Court of Appeals. In that case this Court held as follows:

> "A policy upon a cargo in the name of A, 'on account of whom it may concern,' or with other equivalent terms, will inure to the interest of the party for whom it was intended by A, provided he at the time of effecting the insurance had the requisite authority from such party, or *the latter subsequently adopted it. No proof is necessary that the assured had an insurable interest at that time. It is sufficient if such interest subsisted during the risk and when the loss occurred.*"

In the opinion this Court adopted the construction of the clause contained in *Phillips on Insurance* (Sec. 382 *et seq.*) as follows:

> "Sec. 382. In many policies the assured is so *described that any person may be comprehended,* and avail himself of the contract, by proving his interest and showing that the policy was intended for him."

He then quotes the different forms in use as follows, to which the foregoing statement applies:

England. "As well in his own name as in the name and names of all persons whatsoever to whom the same may in any way appertain."

United States. "The same form is often used in the United States, and also a shorter one of like import, in which the party effecting the policy is insured for 'himself and *whom it may concern.*' "

Marseilles. The form is "such person as should be thereafter named."

Hamburg. The losses are made payable "to bearer."

"Sec. 383. A policy made in the name of a particular person 'for whom it may concern,' or with any other equivalent clause, will be applied to the interests of the party or parties, and only the party or parties for whom it is intended by the person who effects or orders it, if such party has authorized its being made beforehand or subsequently adopts it.

"Sec. 384. The intention of the party who orders the policy determines who are 'concerned' under a general description; *though those intended are not known by the broker who effects the policy, or by the assurers, to be so.*

"Sec. 385. The rule that an insurance 'for whom it may concern' will avail in behalf of the party for whom it was intended, *does not mean that any specific individual must be intended.* * * * *He may intend it for whatever party shall prove to have an insurable interest in the specified subject, in which case it will be applicable to the interest of any person subsequently ascertained to have an insurable interest who adopts the insurance.*

"Sec. 388. *One may become a party* to an insurance effected in his behalf, in terms applicable to his insurance, *without any previous authority from him, by adopting it, either before or after a loss has taken place* and is known to him, though the loss may have happened before the insurance was made."

Mr. Justice SWAYNE, in delivering the opinion in *Hooper* v. *Robinson*, in addition to the foregoing statement in *Phillips*

on Insurance, quotes, with approval, the following statement of the law contained in *1 Perkin's Arnould on Insurance*, p. 238:

"*It is now clearly established that an insurable interest subsisting during the risk and at the time of loss, is sufficient,* and that the assured need not also allege or prove that he was interested at the time of effecting the policy; indeed, it is every day's practice to effect insurance in which the allegation could not be made with any degree of truth; as, for instance, where goods are insured on a return voyage long before they are bought."

The meaning of this clause, as stated in *Phillips on Insurance*, and approved by this Court, has been universally received in the commercial world, and has been always adopted by the courts, without exception, *until the decision of the Circuit Court of Appeals in this case.*

In *Henshaw* v. *The Mutual Safety Insurance Company*, 2 Blatchford 99, a policy was issued to the Norwich and Worcester Railroad Company "on account of whom it may concern," loss payable to Henshaw, the plaintiff, and others, upon the steamer "Atlantic." The plaintiffs in their declaration averred that they were, *at the time of the loss of the steamer*, interested in her to the amount of said insurance. Judge BETTS held that this was sufficient, and that *an averment that they were interested at the time the policy was issued was not necessary.*

This clause was construed by the Court of Appeals of New York in *Duncan* v. *China Mutual Ins. Co.*, 129 N. Y. 237 (1891).

O'BRIEN, J., in delivering the opinion of the court, said:

"The technical phrase 'for whom it may concern,' or any other terms of equivalent import, in such a policy will be applied to the interest of the party for whose benefit it was intended by the person who procures or orders the insurance. These terms will not carry the benefit of a policy to a risk or an interest not fairly within the contemplation of the parties to the policy (Phillips on Insurance, Sec. 383; Parsons on Marine Insurance, 45, Hooper *v.* Robinson, 98 U. S. 528; Henshaw *v.* M. S. Ins. Co. 2 Blatch. 99; Rodgers *v.* Traders Ins. Co., 6 Paige,

583). The result of this principle is that a party *who has an interest in property covered by such a policy at the time of the loss*, will be protected, without any express stipulation to that effect, *though he had no interest at the commencement of the risk*, provided he was intended to be assured. The construction that should be given to such contracts was thus stated by Judge FOLGER in Waring *v.* Indemnity Ins. Co., 45 N. Y. 612: 'Of course it must be made to appear that the owner was in the intention of the person effecting the insurance when the contract was made. Such intention need not have fastened at the time of entering into the contract upon the very person, who when the contract matures seeks to take the benefit of it * * * **and it is to be assumed that every one was in the intention of the assurer, who subsequently with design takes such relations to him as brings him within the clauses of the policy.'"**

It has also been construed in *Fire Ass'n* v. *Merchants' & Miners' Trans Co.*, 66 Md. 339 and 348 (1886), as follows, by MILLER, J.:

"Otherwise policies 'for account of whom it may concern' which are frequently taken out by and in the name of a party in possession, without any previous authority from the owner, could never have been upheld. But such policies are daily issued, and though more frequently used in marine insurance are sometimes found in other policies, *and it has become elementary law in regard to them, that extrinsic evidence may be adduced to show who was in fact the party concerned, and anyone having title to the property at the time of loss may*, by adoption of the contract, avail himself of its advantages, provided it be shown that his interest was within the contemplation of the party procuring the insurance."

The clause which is used in policies in England is of similar import (*Phillips on Insurance*, Sec. 382) and its construction is stated in *Arnould on Marine Insurance*, 112, as follows:

"The true rule, then, would appear to be, that any party to whom an interest in the property insured 'doth, may or shall appertain,' at any time during the pendency of the risk, may under the general words, by subsequent adoption take advantage of the policy to protect such interest, **unless it appears from extrinsic evidence that the person directing the policy to be effected intended at the time so to confine the insurance as not to embrace such interest."**

A true statement of the law, deduced from these authorities, is that the clause "for account of whom it may concern," is not a personal contract to indemnify a specified individual, but is rather the insurance of an interest, and anyone who acquires that interest, may avail himself of the policy by adopting it, just as Martin did in this case.

The learned Judges of the Circuit Court of Appeals, failed to note the fundamental distinction between the present insurance and that which the printed form of the policy was ntended to cover.

The printed form was that of the "standard policy", adopted in a number of States for the insurance of property on land, against loss on fire, and the clauses upon which the respondent relies are inserted for the purpose of preventing an increase of the moral hazard, by the substitution of a new owner of the property, without the consent of the underwriter.

The contract ordinarily made upon that form is *purely personal*, in which the character of the assured plays an important part, and for that reason alone, is not assignable without the consent of the underwriter.

Under policies where the clause "for account of whom it may concern," is used, the question of moral hazard is entirely eliminated, by the insurance of an interest, without reference to the ownership as the parties have no intention of making a personal contract.

The respondents in this case issued their policy to Peter Hagan & Company (*who had no interest whatever in the boat*), without having or demanding any information as to the real owner or owners. They insured a certain interest, which in this case was the entire one, for the benefit of whoever might be concerned in that interest during the life of the policy, and as Martin acquired a portion of that interest during the life of the policy, he became entitled to the benefit of the policy, merely by adoption of it.

II.

Where a policy is issued "for account of whom it may concern," the intention of the underwriter, to which the Court of Appeals seems to have considered as governing, is unimportant; it is the intention of the party who procured the policy which governs.

As is said in *Phillips on Insurance*, Sec. 384:

"The *intention of the party who orders the policy determines who are 'concerned'* under a general description; though those intended are not known by the broker who effects the policy, or by the assurers, to be so."

There is no doubt as to the intention of Hagan, who obtained the insurance, to procure a non-personal policy, covering the entire interest in the boat.

The learned Judge of the district Court, found as follows: (Rec. p. 34).

"In the present case, I have no doubt (and *I find the fact to be*) *that Hagan intended to insure, and to keep insured for one year the entire title to the boat.* He did not intend merely to protect such interest as he himself might have from time to time. If this had been his object the policy would more naturally have been taken out in his own name omitting the qualifying phrase; but he intended to protect the ownership of the boat, whether vested in himself alone, or shared with, or transferred to other persons."

The following testimony, which is quoted because it is the only evidence upon this point, supports that finding.

The broker who procured the policy says (Rec. 34):

"*Q.* What instruction did Hagan give you as to the interest to be insured?

"*A. He told us to insure the tug 'Senator Penrose' in 'the name of Peter Hagan & Company for account of whom it may concern.*"

III.

The Court of Appeals differed from the decisions of other Courts, in assuming that they were bound to give effect to every provision in the policy, either written or printed, and to so construe them all, that standing together, they would make one complete instrument, and if necessary to bring about that result, that they were bound to disregard the ordinary rules of construction of insurance policies.

It is said in the opinion of DALLAS, J. (Rec. p. 40):

"No part of the instrument is to be rejected if it can be maintained as a whole, and in the present instance the printed provisions in question and the written words 'for account of whom it may concern' are not *irreconcilably repugnant.*"

While this is undoubtedly the proper rule of construction of contracts ordinarily, yet it is equally well settled, where a policy of insurance is written upon an inappropriate form, that printed portions, inconsistent with the character of the contract, do not modify the written clauses, but are as completely annulled as if they had been erased from the policy.

In *Dudgeon* v. *Pembroke*, 2 Appeal Cases, 284, a Lloyds form of "*voyage*" policy was filled up as a "*time*" policy on a ship. Various clauses referring to a voyage were left standing in the policy, and from this it was argued that these conditions which only applied to a voyage, but which were left standing, applied, though the policy was in terms a time policy. Judgment was entered in the Exchequer Chamber accordingly.

This was reversed in the House of Lords, and Lord PENZANCE, in recommending the reversal, said as follows:

"It has been suggested that by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage, and also to goods as well as to the ship, the policy is something less or something more than a

time policy. **But the practice of mercantile men of writing into their printed forms the terms by which they desire to describe and limit the risk intended to be insured against without striking out the words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognized in courts of law to permit of any such conclusion."**

It is said in *Arnould on Marine Insurance*, page 294, as follows :

"Hence it is that in the familiar instance of words written in the margin, or at the foot of policies, such written words are considered as applying indefinitely to the whole of the policy, and as controlling the sense of those parts of the printed policy to which they apply. So that by word ship, or freight, or goods, written in the margin, the general terms of the policy, applicable to other subjects besides the particular one mentioned in the margin, are considered as narrowed in point of construction to it."

Instead therefore of considering the case upon the assumption that they *were bound to reconcile the printed and written clauses*, if possible, and that the printed forfeiture clause was not to be eliminated unless in "*plain conflict*" or the clauses were "*irreconcilably repugnant*," it is submitted that the proper question before the Court was whether the printed clause was applicable at all to the present contract of insurance of an interest, without regard to ownership, or whether it was not intended to apply only where there was an insurance of a personal interest. If it was intended to apply to the latter class of cases, then it could not in any way modify the clause "for account of whom it may concern," and the learned Court erred in attempting to reconcile the two clauses, instead of excluding from consideration the printed forfeiture clause.

But it is submitted that even accepting the test applied by the Court, its conclusion that the two clauses were not repugnant could only be reached by failing to follow the construction of the clause "for account of whom it may concern" by this Court, and also by an entire disregard of two primary rules of the construction of insurance policies, viz. (1),that the policy is to be

construed most strictly against the underwriter, and (2) that clauses of forfeiture are to be most strictly construed in favor of the assured.

The rule of construction of forfeiture clauses is so strict that it is only where no other construction is permitted that such one as produces a forfeiture will be adopted.

Hitchcock *v.* Ins. Co., 26 N. Y. 68;
Coyne *v.* Weaver, 84 N. Y. 386;
Walton *v.* Ins. Co., 116 N. Y. 317.

IV.

The conclusion of the Court of Appeals that the conveyance of a half interest to Martin, caused a forfeiture of the entire policy, and destroyed the right of Hagan to recover for the loss of the half interest which he still retained is opposed to the established law upon this subject.

Even if the conclusion of the Circuit Court of Appeals were not opposed to the clearly established law, and to the well recognized commercial usage in reference to policies issued "for account of whom it way concern;" if the case were one of first impression, the decision of the Court would draw comment upon it.

The underwriters issued their policy, to Peter Hagan and Company "(who had no interest in the tug)" without having or demanding the slightest information as to the personality of the owners. They eliminated all question of the moral risk, based upon the personal character of the owners, and until the proofs of loss were submitted, they had not the slightest knowledge who were the owners at the time of loss or at the time of the issuance of the policy.

But the Court of Appeals has held that because it then transpired that Peter Hagan was at the time of the loss only the owner of one half part, instead of the owner of the whole boat, the policy was entirely forfeited.

There was not the slightest change in the risk under the

policy, and notwithstanding the primary principle that forfeiture clauses are to be strictly construed, the Court deprived even Hagan of the indemnity for the half interest which he still owned.

This is opposed to the general rule of law, even where the contract is a *personal* one, that a forfeiture does not occur as long as an insurable interest remains.

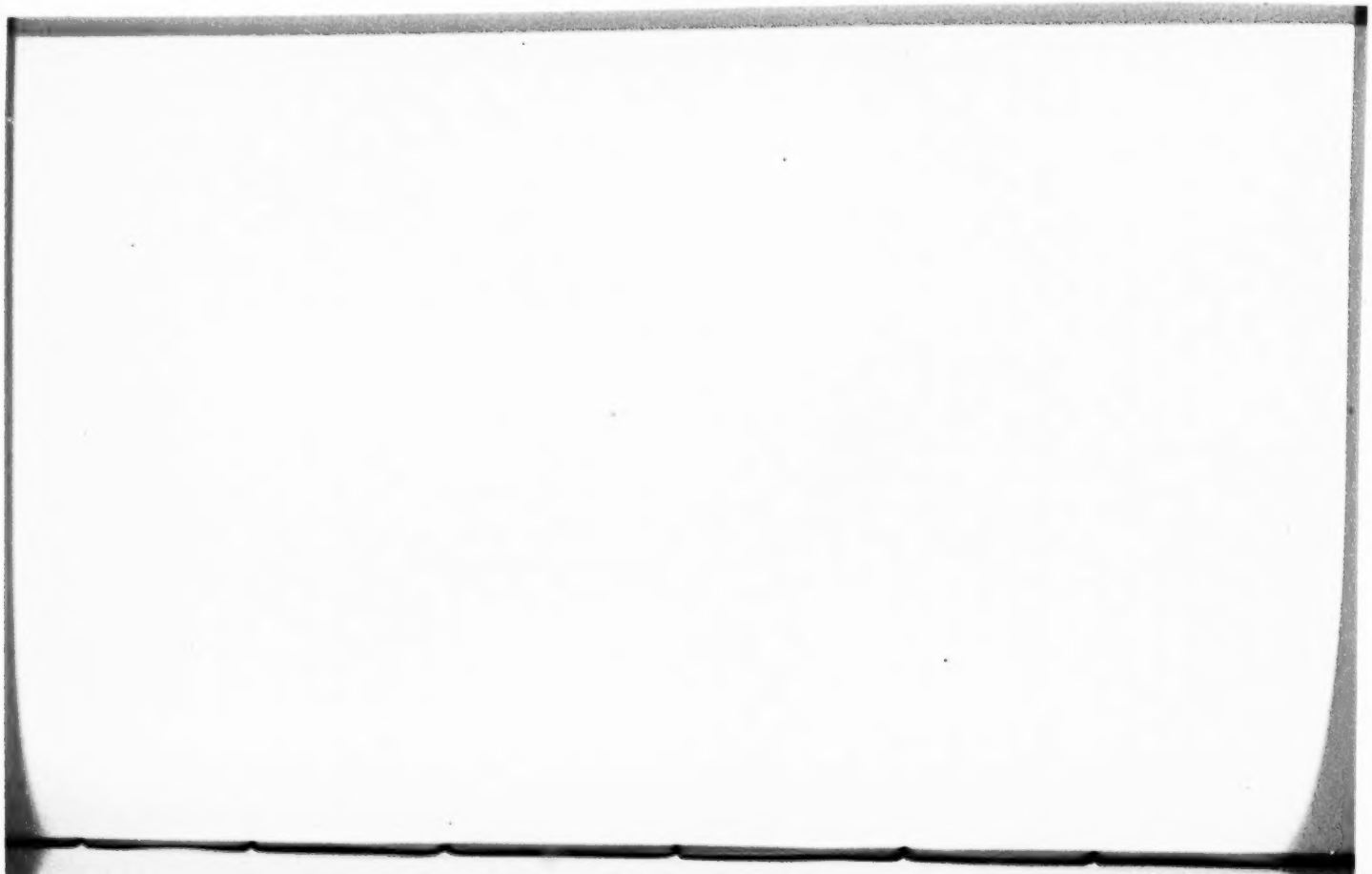
Lazarus *v.* Ins. Co., 5 Pick. 76.
Strong *v.* Ins. Co., 10 Pick. 43.
Stetson *v.* Ins. Co., 4 Mass. 330.
Jackson *v.* Gilvernail, 15 Johns. 278.
Hitchcock *v.* Ins Co., 26 N. Y. 68.
Cowan *v.* Ins. Co., 40 Iowa, 551.

In conclusion, the petitioners do most earnestly argue that the decision of the Court of Appeals ought to be reviewed, because its construction of a clause which is in universal use in the commercial world, is opposed to its construction by this Court and to that given to it in business circles. To permit this narrowed construction of the clause by the Court of Appeals to stand would only create distrust upon a subject which has always been assumed to be free from doubt.

It is submitted, therefore, that a writ of *certiorari* ought to issue, for the reasons heretofore assigned.

HORACE L. CHEYNEY,
JOHN FREDERICK LEWIS,
Counsel for Petitioners.

Bourse Building,
Philadelphia.



Supreme Court U.S.
FILED
MAR 4 1902
JAMES H. McKENNEY,
Clerk

No. 206.

Brf. of Cheyney v Lewis for Pet'rs.

Supreme Court of the United States,

OCTOBER TERM, 1901.

Filed Mar. 4, 1902.

No. 206.

PETER HAGAN AND EDWARD F. MARTIN,

Petitioners—Libellants,

vs.

THE SCOTTISH UNION AND NATIONAL INSURANCE COMPANY,

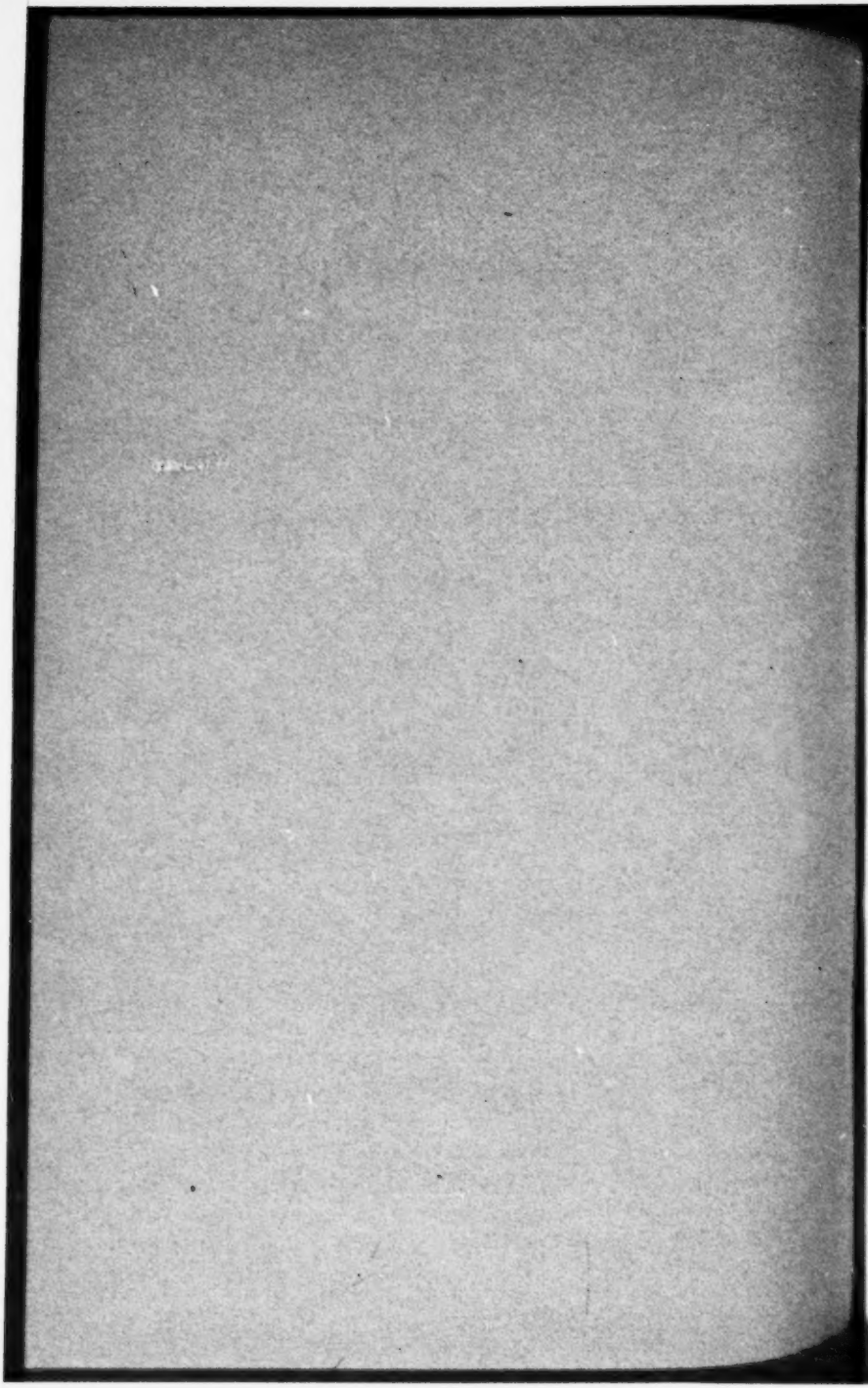
Respondent.

On Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit.

Brief on Behalf of Petitioners—Libellants.

HORACE L. CHEYNEY,
JOHN FREDERICK LEWIS,
Of Counsel.

702 Bourse Building, Philadelphia.



STATEMENT OF THE CASE.

This case is brought here by a writ of *certiorari* to the United States Circuit Court of Appeals for the Third Circuit.

The action was commenced in the District Court of the United States for the Eastern District of Pennsylvania, upon a libel in admiralty, by Peter Hagan and Edward F. Martin, the petitioners, against the Scottish Union and National Insurance Company, to recover under a policy of insurance issued by that company against loss or damage by fire, to an amount not exceeding $2000, on the iron tug "Senator Penrose." The policy was issued November 19th, 1897, insuring "Peter Hagan & Company *for account of whom it may concern for the term of one year*" &c; and contained a clause:

> "This entire policy, *unless otherwise provided by agreement endorsed hereon or added hereto* shall be void * * * if the interest be other than unconditional and sole ownership, * * * or if any change other than by death of an insured take place in the interest, title or possession of the subject of insurance (except changes of occupants without increase of hazard) whether by legal process, or judgment, or by voluntary act of the assured, or otherwise; or if this policy be assigned before a loss, &c."

The policy is printed upon pp. 3-9 of the Record. The words "for account of whom it may concern" are in handwriting, while the whole body of the policy is in print.

When the policy was issued, the tug was owned by Peter Hagan, one of the petitioners, but upon June 14th, 1898, he sold a half interest therein, to Edward F. Martin, the other petitioner. By the terms of the sale, it was agreed that Martin should have the benefit of this insurance, and of a certain other policy issued upon the tug by the National Standard Insurance Company for the sum of $1000. No

formal assignment of either policy was made, nor was the transfer of the half interest in the tug noted thereon, because Hagan was advised by David P. Billington, the broker who had placed the insurance, that the phrase "*for account of whom it may concern for the term of one year, &c.*" rendered such action unnecessary. In fact, before advising Hagan and Martin, the broker consulted Messrs. Mather & Company, agents for one of the underwriters upon the tug and the most extensive marine insurer in Philadelphia, and found that their opinion agreed with his own. He testifies to the customary meaning of the phrase among insurance people, (Record p. 16), as follows :—

> "On the street the general understanding is, that it covers the *interest* of the owners, no matter when they acquire an interest in the property, and no matter whether at the time it is issued or subseqently."

The tug was burned July 30, 1898, proofs of loss were submitted, and the damage adjusted at $2300, by an adjuster appointed by the respondent and by the National Standard Insurance Company, whose policy upon the tug was exactly the same (Record, p. 17) as that of the respondent. The National Standard Insurance Company has paid its proportion of the total loss, one-third thereof, upon its policy of $1000, and the present proceedings were begun against respondent, the other underwriter, to recover the remaining two-thirds, the proportion of $2300, upon respondent's policy of $2000, namely, $1533,33, together with interest.

The District Court entered a decree in favor of the libellants, but the Circuit Court of Appeals for the Third Circuit reversed this decree, and dismissed the libel.

The sole question involved is the construction of respondent's policy of insurance, and especially of the words, "*for account of whom it may concern for the term of one year, &c.,*" and this question is raised by libel, answer and proofs. No testimony, however, was taken in behalf of the respondent, and the facts are not in dispute.

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

2405

SPECIFICATIONS OF ERROR.

In reversing the District Court of the United States for the Eastern District of Pennsylvania, the Circuit Court of Appeals for the Third Circuit erred in the following particulars:

I. In not holding that the phrase "*for account of whom it may concern*," being in handwriting, was dominant as expressive of the intention of the parties.

II. In not holding that the *grammatical* meaning of the phrase contemplated the possibility of changes in the ownership of the tug, and brought within the terms of the contract, those who acquired an insurable interest therein during the life of the policy.

III. In not holding that the *legal* meaning of the phrase, as this Court has decided, is consistent alone with the grammatical meaning.

IV. In not holding that the *customary* and accepted meaning of the phrase, *among insurance men*, is the same as its grammatical and legal meaning.

V. In not holding that when a policy of insurance is ambiguous, that construction is taken which is against the underwriter.

VI. In not holding that a policy should never be forfeited except in a clear case.

VII. And finally, in reversing the District Court and dismissing the Libel.

H. L. CHEYNEY,
JOHN F. LEWIS,
For Petitioners.

ARGUMENT.

I. The phrase "for account of whom it may concern" is in writing.

II. Its grammatical meaning contemplates the "possibility" of changes in ownership, and includes those who acquire an insurable interest in the tug during the life of the policy.

III. Its legal meaning, as this Court has decided, is consistent with its grammatical meaning.

IV. Its customary and accepted meaning among insurance men, is the same as its grammatical and legal meaning.

V. When a policy of insurance is ambiguous, that construction is taken which is against the underwriter.

VI. A policy should never be forfeited except in a clear case.

FIRST POINT.

The only defense made to the payment of petitioners' claim is that set out in the eighth paragraph of the answer (Record, p. 11):

> "That the libellants have not performed all things on their part to be performed by the terms of the insurance, in that no notice was given of the change of ownership or of the interest in said tug by the respective libellants, as required by the terms of the policy."

Respondent contends that by reason of the sale of a half interest in the tug the policy is void. No allegation is made that the sale of a half interest prejudiced the respondent in the slightest, nor that it had aught to do with the damage by fire to the tug, but the mere fact "that no notice was given

2405

of the change," is relied upon as working an absolute forfeiture of the policy, not only as against Martin, but as against Hagan also. The policy, however, contains no clause requiring *notice* of change of ownership, and respondent is, therefore, without other defense than the mere *fact* of Hagan's sale of one-half of the tugboat, without any increase in the interest insured or in the perils to which it was exposed during the life of the policy.

Petitioners contend that the written words "*for account of whom it may concern,*" are controlling as an expression of the intention of the parties, and overcome inconsistent printed provisions; that the policy was a *non-personal* contract, insuring the *interest* represented by the ownership of the whole tug as *property*, and that any person who became entitled to participate in that interest or ownership, during the life of the policy, might avail himself of its benefits by adopting it, provided the intention of the person procuring the policy was to insure the whole interest or property in favor of any person who might be concerned therein. Respondent contends, upon the other hand, that notwithstanding the phrase "*may* concern," those alone *are* concerned who owned in the tug *at the time* the insurance was effected, and no others.

1. The words "for acconnt of whom it may concern" are in writing, and therefore controlling, as expressive of the intention of the parties."

The body of the policy is that of the Standard Fire Insurance Form in use in the States of New York, North Dakota, New Jersey, North Carolina, South Dakota, Connecticut and Rhode Island, and is in *print*, and the learned Judge of the District Court, in sustaining the libel, says (Record, p. 22):

> "The decision of the case depends upon the effect to be given to the words, '*for account of whom it may concern.*' This clause, so far as it may be in conflict with

other language in the policy, must, upon familiar principles, be regarded as dominant. It expresses the special agreement of the policy for it is in writing, while the conflicting provisions are in print, and general printed conditions usually give way to deliberately chosen written words."

Certainly, the learned Judge is correct in giving such effect to a written clause in a policy of insurance, as against a printed one.

The rule as stated by Lord ELLENBOROUGH in *Robertson v French*, 4 East., 130, has never been questioned :

> "If there is any doubt about the sense or meaning of the whole, **the words superadded in writing are entitled to have greater effect attributed to them than the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning."**

In *Parsons on Marine Insurance*, page 65, it is said :

> "All our policies are in part printed and in part written. What is printed is supposed to belong to all policies, or at least to all the policies issued by the underwriters who use that form. **What is written expresses the particulars of that individual bargain. From this follows one obvious rule ; that if what is written conflicts with what is printed, it controls what is printed. The reason is obvious ; for what is written contains the particulars of that very contract, and may be supposed to come under especial consideration."**

Inconsistent written and printed clauses are exceedingly common in policies of insurance and especially in marine policies. No written contracts appear to be drawn with less care (*Parsons on Marine Iusurance*, p. 64), and it often happens that "time" policies are written on "voyage" forms,

and vice versa; that "freight" policies are written on "cargo" forms; and that marine insurance is often contracted for on forms intended for "buildings" or "household goods." Indeed, the policy in question seems, as far as its printed form goes, to be of such a character, and to contain clauses entirely inapplicable, if not inconsistent, with fire insurance upon a tugboat.

The policy insures (Record p. 4) "the following described property while *located and contained as described herein and not elsewhere*," manifestly contemplating insurance upon "goods" in a certain fixed locality, and that they are not to be moved therefrom except upon penalty of forfeiture, and yet the very next clause, which is typewritten and pasted to the printed form, authorizes the tugboat to "engage in such employment as may be incidental to her trade," which would require her to traverse the entire length of the Delaware river and bay, and possibly go to sea to reach neighboring ports.

Again, the policy gives the tugboat the privilege "*to lay up*," and yet seems to provide (Record p. 5), that the policy shall be void, if, "it (apparently the tugboat) ceases to be operated for more than ten consecutive days;" and again, authority is given, "*to undergo alterations and repairs*," and yet the policy subsequently provides (Record p. 5), that the insurance shall be void, if "mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time;" and apparently also, if the tugboat should be "operated in whole or in part at night later than ten o'clock." Many other provisions refer to "the building," and fire originating "in neighboring premises;" and the underwriter is authorized "to take all or any part of the *articles*" at the appraised value; and finally the assured, notwithstanding the fact that the tugboat might be on the voyage at the time, is required to furnish a certificate of the notary living nearest the place of fire, that the loss has been honestly sustained!

2. The clauses relied upon by the Libellants and the Respondent are directly antagonistic.

That upon which the Respondent stands, renders the policy void upon a change of interest, without notice and consent of the assured; while that upon which the Libellants base their claim, manifestly insures unknown persons, provided the interest insured concerned them.

Inconsistent printed portions of the form used, do not merely modify the written clauses, but are as completely annulled as if they had been erased from the policy.

In the case of *Dudgeon* v. *Pembroke*, 2 Appeal Cases, 284, a Lloyds form of "voyage" policy was filled up as a "time" policy on a ship. Various clauses referring to an intended voyage were left in the policy, and from this it was argued, that these conditions applied, though the policy was in terms a time policy. Judgment was entered in the Exchequer Chamber accordingly.

This was reversed in the House of Lords, and Lord PENZANCE, in recommending the reversal, said:

> "It has been suggested that by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage, and also to goods as well as to the ship, the policy is something less or something more than a time policy. **But the practice of mercantile men of writing into their printed forms, the terms by which they desire to describe and limit the risk intended to be insured against, without striking out the words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognized in courts of law, to permit of any such conclusions."**

It is said in *Arnould on Marine Insurance*, page 294:

> "Hence it is that in the familiar instance of words written in the margin or at the foot of policies, such written words are considered as applying indefinitely to the whole of the policy, **and as controlling the sense of those parts of the printed policy to which they apply.** So that by the word "ship," or "freight," or "goods,"

written in the margin, the general terms of the policy, applicable to other subjects besides the particular one mentioned in the margin, are considered as narrowed in point of construction to it."

See *Egbert* v. *St. Paul Fire and Marine Ins. Co.*, 71 Fed., 741.

Policies of insurance, like all other contracts, are to be so construed as to give effect to the intention of the parties, as ascertained by the general scope and purpose of the entire contract.

What was the purpose and intention of the parties as expressed in this policy? Undoubtedly it was to insure a certain *boat* against loss by fire, in favor of persons whose identity was not disclosed. The ownership of the boat is absolutely immaterial. The underwriter did not even inquire who the owner was when the policy was issued, but according to its express terms insured whomsoever was concerned therein during the period of a year, and the underwriter's own estimate of the materiality of the personal hazard involved, is apparent from the phrase "*for account of whom it may concern.*"

The clearly expressed intention of the parties, as shown by their immediate written language, was to cast aside any consideration of moral hazard, and to make the contract a *non-personal* one, covering the subject of the insurance. The general printed clauses do not express that intention, but are applicable to an entirely different contract, that is, a *personal* contract, involving the moral risk. That the printed words were not actually struck out of the policy, is unimportant. The insertion of the written clause is equally effective, rendering them inapplicable to this contract.

3. In this case there has been no increase of risk whatever.

If Hagan had retained his entire interest to the time of the loss, the claim against the company would have been

exactly the same as that now made. It would have been for a loss of the whole of the boat, just as it is at present.

Certainly the law will not look with favor upon an underwriter, who receives and retains a premium, and then tries to evade the payment of a loss, on the ground that the policy has become void by a change of interest which has not increased his risk in the slightest, and especially when he never asked the names of the persons to be insured, but agreed to insure those unknown to him.

The learned Judge of the Circuit Court of Appeals, in reversing the District Court, admits that written words in a policy are dominant, but reaches, what is submitted to be a conclusion in manifest conflict with the terms of the policy itself, when he finds that the written and the printed clauses are not inconsistent. He says (Record, p. 28):

> "It is true that the written terms of a policy will control where they are in plain conflict with its printed clauses, but no part of the instrument is to be rejected, if it can be sustained as a whole, and in the present instance the printed provisions in question and the written words '*for account of whom it may concern*,' are not irreconcilably repugnant. That the policy was issued for account of whom it may concern is undeniable, but whom could it concern?"

Though the learned Judge asks this question, he finds it, upon his construction of the policy, exceedingly difficult to answer. The parties themselves, who went to the trouble of writing the words "*for account of whom it may concern*," must certainly have intended that the policy, with those words in, was to have a different meaning, from the policy without them, and yet the conclusion of the Circuit Court of Appeals is, in effect, that the words are meaningless.

After asking the question, "Whom could it concern?" the learned Judge undertakes to make answer:

> "Possibly, the then existing or future creditors of the boat, or, perhaps, the constituents of Peter Hagan & Company."

but the answer he gives to his own question, is entirely insufficient, because the firm's "*constituents*," were already covered by the words "Peter Hagan *& Company*," and the "*then existing or future creditors* of the boat," could not possibly be within the protection of the policy. There is no evidence that there were any existing creditors, or the likelihood of future ones, or that either party had the slightest intention of doing so unusual a thing, as the learned Judge suggests, namely, insuring *creditors*. Men do not often insure those they *owe*, but rather look out for themselves. Besides, the terms of the policy, upon the very construction put upon it by the learned Judge himself, would become absolutely void, if the interest of the insured was other "than *unconditional* ownership" (Record, p. 5); or if any change took place in the interest "*whether by legal process or judgment or by voluntary act of the insured or otherwise*," and exactly how any lien creditor of the boat, the only kind of a creditor who could have any insurable interest in her, could derive benefit from the policy, or how the learned Judge reconciles the answer he gives to his question, with his own conclusion of the meaning of the policy, is impossible to imagine.

4. The policy itself contemplated that the parties might agree upon special terms inconsistent with its printed provisions.

The very clause Respondent relies on (Record pp. 4–5), providing for the avoidance of the policy under the conditions therein named, says :—

> "This entire policy, *unless otherwise provided by agreement endorsed hereon or added hereto*, shall be void, etc."

And the use of the phrase "*for account of whom it may concern*," as written in the policy, is certainly to be taken as a waiver of any provision of the policy inconsistent therewith.

The parties "*otherwise provided*," by inserting this written clause, which not only does not disclose who the actual owners of the tugboat are, but also expressly contemplates the possibility of changes of ownership during the life of the policy, and notwithstanding which its obligation was to continue.

The Circuit Court of Appeals have ignored a very important fact, expressly found by the District Court (Record, p. 23):

> "In the present case, I have no doubt (and I find the fact to be) that Hagan intended to insure, and to keep insured for one year, the entire title to the boat. He did not intend merely to protect such interest as he himself might have from time to time. If this had been his object, the policy would more naturally have been taken out in his own name, omitting the qualifying phrase; but he intended to protect the ownership of the boat, whether vested in himself alone, or shared with, or transferred to, other persons. This being his intention, and Martin having afterwards adopted the policy by the agreement of sale and by accounting for a proper share of the premium, I think no further difficulty exists."

SECOND POINT.

The grammatical meaning of the phrase "for whom it may concern for the term of one year, etc.," is inconsistent with Respondent's position.

The words "*may concern*" are in the potential mood, and affirm "possibility with respect to that which is future," or as the Century Dictionary says in reference to the word "*may*," "*indicate possibility with contingency.*" If the only persons insured by the policy, were those directly interested *at the time it was executed*, as respondent contends, the phrase should have been "for account of whom it *does* concern," or "*for whom it concerns*," and there was no necessity for using a phrase

24063

which pre-supposed the "possibility" that a "contingency" would arise, when others *might* be concerned in the policy with Hagan, or indeed, might be alone interested therein. The phrase "for whom it may concern," was used in connection with the phrase "*for the term of one year* from the nineteenth day of November, 1897," etc. No comma separated the two phrases, and the *future* reference of the clause, when read in connection with the term during which it was to operate, becomes unmistakably apparent. The grammatical meaning is nothing else, than that the policy enures to the benfit of Peter Hagan & Company and any one concerned therein during the period of one year from the date named.

THIRD POINT.

The legal meaning of the phrase "for account of whom it may concern," covers those owning the thing insured at the time the policy is executed, and those who may acquire an interest thereunder, by the subsequent adoption of the policy.

Before considering the authorities upon this point, attention is directed to some distinctions between the ordinary policy, insuring against loss to property on land, and marine policies like the one issued in this case.

Generally the former is a personal contract. It is personal because of the moral, as well as the physical hazards, involved and by reason of the moral risk, such policies are not generally assignable without the consent of the underwriter. If they were so assignable, then the risk might be increased without the underwriter's consent or knowledge. In marine policies, issued "for account of whom it may concern," or where similar clauses are inserted, the assured is not designated, and the element of moral hazard is eliminated by the act of the assurer, in agreeing to indemnify *unknown*

persons. This feature is common in marine policies, and the greater risk is fully considered in fixing the premiums.

Buck v. *Chesapeake Ins. Co.*, 1 Peters, 151.

Insuring unknown persons has grown out of the peculiar character of the property involved. The insurable interests in marine property, are subject to such frequent changes, that it is almost impossible, at times, to specify who are the real parties. It has also partly grown out of the popular and legal conception of marine interests, by which a vessel is regarded as an actor.

The insurance under such policies is really upon the *goods or interest.* This idea is so common, that it is contended by recognized authorities upon insurance, that in such cases the policy is as freely assignable as a bill of lading.

Phillips on Insurance, Sec. 76.
Duer on Marine Insurance, Vol. 2, p. 51, note.

In *Phillips on Insurance* it is said:

> "Sec. 382. In many policies, the assured is so *described that any person may be comprehended* and avail himself of the contract, by proving his interest and showing that the policy was intended for him."

Mr. Phillips then quotes different forms in use, to which his statement applies:

England. "As well in his own name, as in the name and names of all persons whatsoever to whom the same may in any way appertain."

United States. "The same form is often used in the United States, and also a shorter one of like import, in which the party effecting the policy is insured 'for himself and whom it may concern.'"

Marseilles. The form is, "Such person as should be thereafter named."

Hamburg. The losses are made payable "to bearer."

Mr. Phillips continues, and his statement of the law is approved in *Hooper* v. *Robinson*, 98 U. S., 528, (*infra.*)

> "Sec. 383. A policy made in the name of a particular person 'for whom it may concern,' or with any other equivalent clause, will be applied to the interests of the party or parties, and only the party or parties, for whom it is intended by the person who effects or orders it, if such party has authorized its being made before hand, or subsequently adopts it.
>
> "Sec. 384. The intention of the party who orders the policy, determines who are 'concerned,' under a general description, though those intended are not known by the broker who effects the policy, or by the assurers, to be so.
>
> "Sec. 385. The rule that an insurance 'for whom it may concern' will avail in behalf of the party for whom it is intended, does not mean that any specific individual must be intended. * * * He may intend it for whatever party shall prove to have an insurable interest in the specified subject, in which case it will be applicable to the interest of any person, subsequently ascertained to have an insurable interest, who adopts the insurance.
>
> "Sec. 388. One may become a party to an insurance effected in his behalf, in terms applicable to his insurance, without any previous authority from him, by adopting it, either before or after a loss has taken place and is known to him, though the loss may have happened before the insurance was made."

The first time that the phrase "*for whom it may concern*," as used in a policy of insurance, came before this Court, was in *Buck & Hedrick* v. *The Chesapeake Insurance Company*, 1 Peters' Reports, p. 151. That case differs from this, because the construction of the words was directed simply towards determining whether the property of a belligerent was covered by the policy, but in the argument before the Court and in the opinion, a meaning is given to the phrase, which seems quite inconsistent with Respondent's position. Two policies were issued on the cargo of the brig "Columbia," insuring

Buck & Hedrick, "*for whom it may concern*," and containing the usual clause that the perils insured against, were "of the seas, men-of-war, fire, enemies, &c." In the applications which were made for the insurance, the particulars were fully stated, but no warranty given that the risk assumed was a peace risk. In a letter of April 27, by virtue of which the insurance was applied for, the policy was asked, seemingly, in behalf alone of Daniel Fitch, who was the master of the "Columbia."

Counsel for plaintiff argued, that the use of the phrase " for whom it may concern " relieved the plaintiffs from disclosing the parties intended to be insured, either at the time of effecting the insurance, or at any other time, and that a policy so worded, "covers all possible persons and all possible interests, belligerent as well as neutral."

Mr. Justice JOHNSON, in delivering the opinion of the Court, held that the terms of the policy were broad enough, to cover not only the undoubted interest of the master of the brig, but also the interest of a certain merchant, who was a Spanish subject of Porto Rico, and at that time, affected with the character of a belligerent.

The opinion says :

> " That a policy 'for whom it may concern,' will in ordinary cases, cover belligerent property has been fully conceded in argument. Nor is it contested, that previous representations will be sunk or absorbed, or put out of the contract, where the policy is executed in obvious inconsistency with those representations. But the ground here insisted on for defendants, is, that the letter of April 27th, was a representation that the whole cargo was *Captain Fitch's*, and that it thereby operated as an imposition upon the underwriters, and as such, avoids both policies; or that it affixes a conventional meaning to the phrase, in these policies, which limit its ordinary import.
>
> Is there unything in the case sufficient to except these policies from the ordinary import and effect of the phase 'for whom it may concern?'
>
> We are of opinion there is not."

The learned Judge further says:

> **"The defendants had a right to make what inquiries they pleased, as to the real character of the cargo, and if they did not make those inquiries, the law imputes to them the use of the phrase, 'for whom it may concern,' in its ordinary effect and signification."**

While the decision fails to cover the exact point now to be decided, it certainly is of value, as showing the breadth of meaning, which this Court has attached to the phrase in question.

In *Insurance Company* v. *Chase*, 5 Wall., p. 509, the defense was want of insurable interest, and it was argued that the party effecting the insurance, had done so without the authority of his fellow trustees. Mr Justice DAVIS in delivering the opinion, says, p. 514:

> "If (a Trustee insures) without authority, still it is a valid contract, which the underwriter cannot dispute, if his co-trustees subsequently ratify it. *Blanchard* v. *Waite*, 28 Maine, 57. In fact, so liberal is the rule on this subject, that where a part owner of a property effects insurance for himself and others, without previous authority, the act is sufficiently ratified, where suit is brought on the policy in their names. *Finney* v. *The Fair Haven Insurance Company*, 5 Metcalf, p. 192."

In *Hooper* v. *Robinson*, 98 U. S. Reports, p. 528, the question now before the Court was raised and determined, and while the facts were essentially different from those shown by this record, they were sufficiently analogous to make the Court's decision of controlling weight.

The policy of insurance was to "James Hooper & Company *on account of whom it may concern*, in case of loss to be paid to their order," the insurance being "on merchandise, to cover such risks as are approved and endorsed on the policy." The endorsements set forth the name of the vessel, the voyage, the premium, the amount of insurance and the remark,

"paid advance to cover disbursements and repairs." The instrument was a cargo policy. Hooper was agent for a British steamship, which had come to Baltimore consigned to him, and which after having taken on board her return cargo, had been injured by a collision with another vessel and had to put back to Baltimore for repairs. He paid her repair bills and other disbursements, and the captain drew a draft on Good Brothers of Hull, England, for the necessary amount, in favor of Hooper, and directed Hooper to protect the drawees by insurance. The policy in question was intended for that purpose.

The draft was bought by Baltimore bankers, and sent to their correspondents in London, where it was accepted by Good Brothers and subsequently paid. The steamship upon her outward voyage, however, foundered at sea, and Hooper & Company collected the insurance and remitted to Good Brothers. The suit was brought to recover the money back from Hooper, upon the ground that he was without insurable interest; and that when the insurance was effected, there was no evidence that Good Brothers had authorized the master to draw on them, or even knew that he intended so to do, or were under any obligation to accept or pay the bill; and that they therefore had no insurable interest in the premises. Among the disbursements for which the draft was drawn, was a charge for the insurance.

It was argued in behalf of Hooper, that the phrase "*for whom it may concern*," covered every insurable interest, "even an inchoate and contingent one," and that the policy enured to the benefit of anyone having an insurable interest, either at the time the policy was executed, or whose interest was subsequently ascertained by an adoption of the insurance, and that it was quite immaterial, whether the person intended to be protected, authorized the insurance in the first instance, or subsequently adopted it. Upon the part of the underwriter, however, it was argued that the phrase in question, protected only those who had an insurable interest *at the*

2406

date of the policy and at the time of the loss. The opinion of the Court was delivered by Mr. Justice SWAYNE:

> "A policy like the one here in question, in the name of a specified party, '*on account of whom it may concern*,' or with other equivalent terms, will be applied to the interest of the persons for whom it was intended by the person who ordered it, provided the latter had the requisite authority from the former, or they subsequently adopted it. *I. Phillips on Ins.*, Sect. 383.
>
> This is the result, though those so intended are not known to the broker who procures the policy, or to the underwriters who are bound by it. *Id.*, Sect. 384.
>
> One may become a party to an insurance effected in terms applicable to his interest, without previous authority from him, by adopting it either before or after the loss has taken place, though the loss may have happened before the insurance was made. *Id.*, Sect. 388.
>
> The adoption of the policy need not be in any particular form. Anything which clearly evinces such purpose is sufficient.
>
> It is now clearly established, that an insurable interest, subsisting during the risk and at the time of the loss, is sufficient, and that the assured need not also allege or prove, that he was interested at the time of effecting the policy; indeed it is every day practice to effect insurance in which the allegation could not be made with any degree of truth; as, for instance, where goods are insured on a return voyage long before they are bought." 1 Perkin's Arnould, 238.

Or as the syllabus of the case (presumably by the Court) puts it succinctly:

> "A policy upon a cargo in the name of A, '*on account of whom it may concern*,' or with other equivalent terms, will inure to the interest of the party for whom it was intended by A, provided he, at the time of effecting the insurance, had the requisite authority from such party, or the latter subsequently adopted it. No proof is necessary that the assured had an insurable interest at that time. It is sufficient if such interest subsisted *during the risk and when the loss occurred.*"

The following authorities are also cited as bearing upon the question at issue.

Henshaw v. *The Mutual Safety Insurance Company*, 2d Blatch., p. 99, was a suit on a policy of marine insurance, insuring the Norwich & Worcester Railroad Company "*on account of whom it might concern*," loss payable to Henshaw, from the 15th of August. 1846, to the 15th of August, 1847, upon the steamer, "Atlantic," each passage subject to its own average. Henshaw alleged that at the time of the *loss* of the steamer he was interested in her to the amount of the insurance, while the underwriter defended upon the ground, that Henshaw was not interested at the time of the *insurance*, or "at the time of the *commencement* of the risk under the policy."

The case was heard before Judges NELSON and BETTS of the Southern District of New York, and the opinion of the Court was delivered by the latter. After stating that the defense was based upon the plaintiff's want of interest in the subject matter of the insurance at the time the policy was executed and when it was to take effect, he says :

> "We consider these points in the construction of policies of insurance to be incontestably settled. First, they are to have a liberal and benign interpretation in behalf of the insured; Second, they are to be construed, and enforced according to the plain intent of the parties, if no settled rule of law interposes to prevent; Third, whether or not, by the general rules of insurance law, the fact that the insured party had no insurable interest in the subject insured at the time it was intended the contract should commence its operation, although he possessed such interest at the time of the loss, would render the policy invalid, yet clearly it is competent for the parties to contract with a view to such a condition of things. (3 *Kent's Comm.* 258, 6th ed.; 1 *Duer on Ins.*, 159, 160, note 1; *Rogers* v. *Traders' Ins. Co.*, 6 Paige, 583,596.) There is, however, strong color at least for the doctrine, that the party intended to be insured will be protected, if he had an interest at the time of the loss without any express stipulation to that effect, although he had no interest at the commencement of the risk.

(*Hughes on Ins.*, 42; 2 *Duer on Ins.*, 49, Sec. 31; *Sutherland* v. *Pratt*, 11 Mee. & W. 296; *Hancox* v. *Fishing Ins. Co.*, 3 Sumn., 132, 140, 142)."

The learned Judge continues, and his language seems especially pertinent to the facts now before the Court:—

> "It was a time policy on a steam vessel, for a succession of voyages, each voyage to bear its own average. It was made at the instance of the Norwich and Worcester Railroad Company, *on account of whom it might concern*, the loss payable to the plaintiffs, and the interest was vested in them when the loss occurred. (*Aldrich* v. *Equitable Ins. Co.*, 1 Woodb. & M., 272,276; 1 *Duer on Ins.*, 160, note 1.) Upon the statement of the contract, set forth in the declaration, we think that no stronger form of stipulation can be necessary, to render it palpable, that the underwriters intended by their agreement, **to insure all the interest, to the extent of $15,000, which should be owned in the vessel at the time of her loss within the policy, and to pay the loss to the plaintiffs, for the benefit of the actual owners.**"

He further says, as to the manifest advantage of policies payable to *any person* concerned in the property insured:—

> "This is the ordinary and, perhaps, the most serviceable class of insurances. Cargoes can be purchased and laden from port to port, on trading voyages, under the protection of policies already in existence, without waiting for the means of obtaining satisfactory insurance after the interest is acquired. **The same principle applies to the changeable proprietorships of vessels; and we have no difficulty in expounding the present policy, as contemplating a succession of ownerships in the steamer, and as intended by the underwriters to cover the interest in the vessel, in whomsoever it might be vested when a loss should occur.**"

The exact phrase now in question was construed by the Court of Appeals of New York, in *Duncan* v. *China Mutual Ins. Co.*, 129 N. Y., 237 (1891).

O'BRIEN, *J.*, in delivering the opinion, said:

"The technical phrase '*for whom it may concern*,' or any other terms of equivalent import, in such a policy, will be applied to the interest of the party for whose benefit it was intended by the person who procures or orders the insurance. These terms will not carry the benefit of a policy to a risk or an interest not fairly within the contemplation of the parties to the policy (Phillips on Insurance, Sec. 283; Parsons on Marine Insurance, 45; Hooper *v.* Robinson, 98 U. S., 528; Henshaw *v.* M. S. Ins. Co., 2 Blatch., 99; Rogers *v.* Traders' Ins. Co., 6 Paige, 583.) The result of this principle is, that a party *who has an interest in property covered by such a policy at the time of the loss*, will be protected, without any express stipulation to that effect, *though he had no interest at the commencement of the risk*, provided he was intended to be assured. The construction that should be given to such contracts, was thus stated by Judge FOLGER in Waring *v.* Indemnity Ins. Co., 45 N. Y., 612; 'Of course it must be made to appear, that the owner was in the intention of the person effecting the insurance when the contract was made. **Such intention need not have fastened at the time of entering into the contract upon the very person who, when the contract matures, seeks to take the benefit of it * * * and it is to be assumed that every one was in the intention of the assurer, who subsequently, with design, takes such relations to him as brings him within the clauses of the policy. The intention must have been to effect insurance, for any and all persons, who during the running of the policy, should have goods within the description of the policy.'**"

It has also been construed in *Fire Ass'n* v. *Merchants' & Miners' Trans. Co.*, 66 Md., 339 and 348 (1886), as follows, MILLER, J.:

"Otherwise policies 'for account of whom it may concern,' which are frequently taken out, by and in the name of a party in possession, without any previous authority from the owner, could never have been upheld. But such policies are daily issued, and though more frequently used in marine insurance, are sometimes found in

24068

other policies, **and it has become elementary law in regard to them, that extrinsic evidence may be induced to show, who was in fact the party concerned, and any one having title to the property at the time of the loss may,** by adoption of the contract, avail himself of its advantages, provided it be shown that his interest was within the contemplation of the party procuring the insurance."

The clause which is used in policies in England, is of similar import (*Phillips on Insurance*, Sec. 382), and its construction is stated in *Arnould on Marine Insurance*, 112, as follows:

> "The true rule, then, would appear to be, that any party to whom an interest in the property insured 'doth, may or shall appertain,' at any time during the pendency of the risk, may, under the general words, by subsequent adoption, take advantage of the policy to protect such interest, unless it appears from extrinsic evidence, that the person directing the policy to be effected, intended at the time, so to confine the insurance, as not to embrace such interest."

FOURTH POINT.

The trade meaning of the phrase agrees with its grammatical and legal meaning.

The testimony of Mr. Billington, the insurance broker, upon this point, Record p. 16, is uncontradicted. He says:

> "On the street the general understanding is, that it covers the interest of the owners, no matter when they acquire an interest in the property, and no matter whether at the time it is issued or subsequently."

and he says that when he told Hagan and Martin, that the phrase covered the latter, after Hagan's sale of one-half interest in the tug:

> "I was simply following out the custom I had been taught, and as it was the custom of the street."

Evidence is clearly admissible to show the established trade meaning of this clause.

The law is thus stated in *Joyce on Insurance*, Sec. 217 :

> "Where a word has acquired by usage in trade or commerce a meaning peculiar thereto, * * * or where it appears from the context that the words are used in a particular sense to compass the intent of the parties, such meaning may be shown by proper evidence, and the exact technical or commercial meaning will govern."

The law is similarly stated in *Greenleaf on Evidence*, (15th Ed.), Sec. 292 ; *Arnould on Marine Ins.*, p. 275 ; *Richards on Insurance*, p. 52.

In *Arnould on Marine Insurance*, it is said, p. 287 (MacLachan's Edition) :—

> "Where the sense of the words and expressions used in a policy, is either ambiguous or obscure on the face of the instrument, or is made so by proof of extrinsic circumstances, parol evidence is admissible to explain by usage, their meaning in the given case."
>
> "The words and phrases employed in policies may be obscure in themselves, as when they are entirely technical aud local, so as, without explanation, to be quite unintelligible to the generality of persons ; in this case, their ambiguity of meaning appears, upon merely reading them, as they stated in the instrument ; it is patent on the face of it. Again, the words employed may have an ordinary meaning, intelligible to people in general, without reference to any particular business, yet, if they also have another meaning peculiar to a particular business, and the circumstances of the case show, that such secondary or less general sense, is that in which they are used in the instrument of which the meaning is to be ascertained, parol evidence may be resorted to in this case also, to explain the real meaning of the contract, by showing the sense in which the parties to it employed their words."

24069

He then proceeds to cite the following among other instances :—

In *Mason* v. *Skurray*, 1 Park Ins., 245, parol testimony was admitted to show that the term "corn," was meant to comprehend every sort of grain and also beans and peas,

In *Moody* v. *Surridge*, 1 Park Ins., 245, the same evidence was admitted to show that the same term included malt.

In *Coit* v. *Commercial Ins. Co.*, 7 Johnson (N. Y.), 385, evidence of mercantile men, was admitted to show that the word "roots" contained in a policy, was confined in its application to perishable roots, such as beets and other garden roots, and did not apply to sarsaparilla, a dry hard root.

In *Astor* v. *Union Ins. Co.*, 7 Cowan, 202, evidence was admitted to prove that the word "skins," did not include bear skins having fur on them.

In *Parr* v. *Anderson*, 6 East., 202, a vessel was insured "either with or without letters of mark." Evidence was admitted to show, whether these words gave the vessel the right to chase, for the purpose of attack and capture, or whether they were confined to leave to employ force for the purpose of defense only.

In *Robertson* v *Clark*, 1 Bing. 445, the voyage was stated in the policy to be "from Van Diemen's Land to a port or ports of loading in India and the Indian Islands." The Court held that although amongst geographers, Mauritius was deemed an African island, yet parol evidence was admissible to prove that in commercial language it passed for an Indian island.

In *Houghton* v. *Gilbart*, 7 C. & P., 701, TINDALL, *C. J.*, held that the word "cargo" was a term of mercantile import

and its sense, as used in a policy, was a question for the jury, and could not be decided by the dictionary definition.

In *Peich* v. *Dickson*, 1 Mass., 10, Judge STORY admitted evidence to show the meaning of the word "freight," used in a policy, on the ground that it was a word, which in commercial parlance, had different meanings.

Mr. Billington's evidence did not vary or contradict the terms of the written instrument, but interpreted those terms and made them certain. It simply interpreted that which was otherwise obscure. The opinion of the Circuit Court of Appeals utterly ignores this evidence, while it is certainly entitled to consideration, if the real and legal intention of the parties, is the thing to be discovered.

In the *Barnstable*, 84 Fed., p. 895, a decision by Judge BROWN, sitting in the District Court for the District of Massachusetts, and which was affirmed by the Circuit Court of Appeals in 94 Fed., p. 213, a charter party contained a clause: "The owner shall pay for the insurance on the vessel." The evidence was offered of the broker who negotiated the charter for the owner, that this meant "all insurance on the vessel in any way, shape or manner against stranding, collision and everything, as is usually done in all vessels."

Its inadmissibility was urged, but the Court admitted it.

> "It did not vary, add to, or contradict the writing, but only interpreted and made certain its terms." *Lonergan* v. *Buford*, 148 U. S., 581,588, 13 Sup. Ct., 684. "If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case, and of statements made by any party to the document, as to his intentions in reference to the matter to which the document relates." 7 *Am. and Eng. Enc. Law*, 93.

The case of *Lonergan* v. *Buford*, 148 U. S., p. 581, involved the construction of a contract for the sale of all the

2407

cattle on certain ranches, except two thousand steers, reserved in order to fulfill a previous contract, and the Court held, Mr. Justice BREWER, delivering the opinion, that there was no error in admitting evidence in reference to the ages of the steers which the defendants had sold under the first contract, and which were to be excepted from the second, because such testimony did not vary or contradict the terms of the writing, but simply identified the property which was to pass thereunder.

FIFTH POINT.

When a policy is ambiguous, that construction should be taken which is against the underwriter.

The American courts have invariably adopted the rule, that as a policy of insurance is a contract of indemnity, prepared and signed by the underwriter, the construction in doubtful cases must be against him, where he has received the premium, and defends, after a loss and a claim against him for the indemnity he agreed to provide.

In *Insurance Company* v. *Wright*, 1 Wall., p. 456, when a marine policy was before the Court for construction, Mr. Justice MILLER said:

> "The policy is signed by the company and not by the plaintiff. All its promises are made by the company in its own language. All its exceptions and reservations are those of the company. The rule is that when in such cases the language requires construction, it shall be taken most strongly against the party making the instrument."

In *Nat. Bank* v. *Ins. Co.*, 95 U. S. A., 679, Mr. Justice HARLAN, in applying this rule said:

> "The company cannot complain of such a rule. Its

attorneys, agents or officers prepare the policy. It is its own language which the court is invited to interpret, and it is both reasonable and just, that its own words should be construed most strongly against itself."

All ambiguities and obscurities in a policy of insurance are to be resolved against the underwriter, and therefore the word "effected" in an accident policy, will not, in order to relieve the insurer, be read "affected," although the word be meaningless as written. *Commercial Traders' Association* v. *Fulton*, 79 Fed., affirmed in the Circuit Court of Appeals, 93 Fed., p. 621.

A policy of insurance, where there is doubt as to its meaning, should be construed most strongly against the insurer.

Phenix Insurance Company v. *Willcox & Gibbs Company*, 65 Fed., p. 724; 13 C. C. A., p. 88.

Ambiguous provisions in a policy of insurance must be construed most favorably to the insured. *McMasters* v. *New York Life Insurance Company*, 78 Fed., p. 33; affirmed in 90 Fed., p. 40.

The general rule is, that when a stipulation or exception in a policy of insurance is susceptible of two meanings, that meaning is to be adopted, which is most favorable to the assured.

Nat. Bank v. *Ins. Co.*, 95 U. S., 679; *Hoffmann* v. *Ætna Ins. Co.*, 32 N. Y., 405; *Rann* v. *Ins. Co.*, 50 N. Y., 389; *Allen* v. *Ins. Co.*, 85 N. Y., 473; *Ins. Co.*, v. *Croffer*, 32 Pa., 351; *Franklin Ins. Co.*, v. *Updegraff*, 43 Pa., 350; *Franklin Ins. Co.* v. *Brock*, 57 Pa., 74.

SIXTH POINT.

A policy of insurance should never be forfeited after a loss except in a clear case.

In *Phillips on Insurance*, Sec. 107, it is said:

> "A restriction in a policy that it shall become void by assignment without the consent of the underwriters, is not void as an unlawful restraint upon the transfer of property, but it is to be strictly construed. * * *
>
> "As to the rule of strict construction of this clause, it can only be applied on principles which govern the construction of any other contract; namely, that in case of doubt, the presumption is to be against the party whose it is, and that, in determining the construction, regard is to be had to the subject matter and the known motive for introducing the provision."

The case of *McMasters* v. *New York Life Insurance Company*, 78 Fed. 33, affirmed in 90 Fed. 40, is especially in point. Judge SHIRAS says, 90 Fed., p. 45:

> "Forfeitures are not favored, either at law or in equity; and to sustain the right to declare a contract, which has gone into effect, forfeited, by reason of a subsequent failure to perform its conditions, it is incumbent on the party pleading the forfeiture, to clearly establish the defense; and in the case of contracts like insurance policies, wherein the insured has no voice in the selection of the terms used, the construction must be against the party who prepared the contract; and, furthermore, if there be found in the policy provisions which are inconsistent or contradictory, force must be given to those that sustain, rather than to those which forfeit the contract."

In conclusion, it is submitted, that the policy was issued in favor of Peter Hagan & Company (who had as a firm no earthly interest in the Tug, Record, p. 20), and the words added "for account of whom it may concern," without any information being required as to whom the owners of the boat

really were. All questions of moral risk, based upon the personal character of the owners, was thereby eliminated from the contract by the act of the underwriter himself. Not until the proofs of loss were submitted, had he any knowledge who were the owners of the boat, either at the time the policy was issued or at the time the loss occurred, and a decision that the entire policy is forfeited, works manifest injustice. Though there has not been the slightest change in the risk under the policy, the Circuit Court of Appeals deprives Hagan even of the indemnity for the half interest which he still owned.

It is respectfully submitted that the decision of the Circuit Court of Appeals should be reversed, and a decree entered in behalf of the Petitioners.

HORACE L. CHEYNEY,
JOHN FREDERICK LEWIS,
Of Counsel for Petitioners